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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

R. WILLIAM GRAHAM - PETITIONER

VS.

MARCIA J. MENGEL, Clerk of Supreme Court of Ohio and Secretary of the Board of Bar Examiners, et al. - RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court erred in finding it did not have subject matter jurisdiction over R. William Graham's attack of the State of Ohio's administration of the July 1990 bar examination, wherein the Ohio Supreme Court Clerk failed to follow Ohio bar examination administration rules in instructing a newly appointed bar examiner as to what numerical score is to be assigned to an exam answer which demonstrates minimum competency, and that said failure resulted in said examiner assigning failing scores to more than ninety-nine percent (99%) of those graded by said examiner?

PARTIES

R. William Graham,

Petitioner,

v.

Marcia J. Mengel, Clerk of The Supreme Court of Ohio
30 East Broad Street, Columbus, Ohio 43215;

Members of the Supreme Court of Ohio,
Thomas J. Moyer,
A. William Sweeney,
Robert E. Holmes,
Andy Douglas,
J. Craig Wright,
Herbert R. Brown, and
Alice Robie Resnick;
30 East Broad Street, Columbus, Ohio 43215;

and

Members of the State of Ohio Board of Bar Examiners,
Michael L. Gordon,
Indra K. Shah,
Leslie W. Jacobs,
Phillip J. Campenella,
Keith McNamara,
James F. Deleone,
Larry H. James,
Kathleen M. Trafford,
Alan C. Travis,
Frederick Byers,
John A. Harris, III,
Theodore G. Gudorf,
30 East Broad Street, Columbus, Ohio 43215

Respondents.

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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1993

R. William Graham, Petitioner

vs.

Marcia J. Mengel, et al., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, R. William Graham, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit refusing to reverse the district court's judgment that the district court lacked subject matter jurisdiction to entertain Petitioner's complaint.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit was not recommended for publication and appears in Appendix A to this Petition. The opinion of the District Court for the Southern District of Ohio Western Division appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on February 3, 1993. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution is set forth in pertinent part in Appendix C and Title 28 U.S.C. § 1331, 1343 (a) set forth in Appendix D.

STATEMENT OF THE CASE

This action originated with Petitioner filing a complaint against the Clerk of the Ohio Supreme Court, Justices of the Ohio Supreme Court and the members of the Ohio Board of Bar Examiners in their individual and official capacities in the District Court for injunctive, declaratory and monetary relief for the violation and deprivation of Petitioner's constitutional rights as guaranteed by the Fourteenth Amendment of the United States Constitution, Title 42, Sections 1983 and 1985. On February 19, 1992 Judgment

was returned against Petitioner in the Southern District of Ohio Western Division, dismissing Petitioner's complaint for want of jurisdiction

On March 20, 1992, Petitioner filed a Notice of Appeal. Before the Court of Appeals for the Sixth Circuit, Petitioner submitted briefs to support that the District Court had jurisdiction to hear Petitioners' complaint. On February 3, 1993, without stating its reasoning, the Court of Appeals for the Sixth Circuit affirmed the District Courts judgment.

REASONS FOR GRANTING WRIT

Certiorari should be granted for two reasons: The Petition presents an issue resolved by implication by this Court but not specifically and unequivocally decided by this Court; and the Opinions below conflict, by implication, with previous decisions of this Court and decision of other Circuits.

This Court has implicitly held that a District Court may review unconstitutional conduct of a state's action in a judicial context so long as the act sought to be reviewed was not judicial itself, and, in particular, review a state licensing board's failure to follow its own administrative rules which resulted in a violation of Petitioner's constitutional protected rights. Forrester v. White, 484 U.S. 219 (1988). While state licensing boards may be lodged with the authority to render a final decision in a judicial context, the administration of rules within such contexts are in no way judicial nor are they so inextricably intertwined in a judicial proceeding as to render them nonreviewable and with no appeal lying except to the tribunal which empowered the board. Yick Wo v. Hopkins, 118 U.S. 356 (1866). Fundamental rights in the case at hand are not unlike those protected in Yick Wo v. Hopkins,

wherein the Court noted that government should be of laws and not of men. Here, the fact that the Ohio Board of Bar Examiners and Clerk (adminstrator of the exam) perform roles in a judicial context is not sufficient reason to immunize unconstitutional conduct from review in the federal courts.

In Forrester v. White, 484 U.S. 219 (1988), this Court held that a state court judge did not have absolute immunity from suit for damages under 42 U.S.C. § 1983 for his decision to dismiss a subordinate court employee. Id. at 219. "Absolute immunity is strong medicine, justified only when the danger of officials being deflected from the effective performance [of their jobs] is very great." Id. at 230; Supreme Court of Virginia v. Consumers Union of the United States, Inc., 466 U.S. 219 (1980); Consumer's Union of U.S. v. American Bar Association, 505 F. Supp. 822 (1981). Officials have the burden of showing

that such an exemption is justified by overriding considerations of public policy. Forrester at 224.

Here, no such conditions exists. To the contrary, the public would be best served by insuring proper administration of the bar examination is effected.

This Court should grant certiorari here to explicitly rule that the District Court has jurisdiction to hear the claim presented by the complaint.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: May 3, 1993

Respectfully submitted,

R. William Graham

R. William Graham
Pro se

APPENDIX A

No. 92-3283

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

R. WILLIAM GRAHAM, Plaintiff-Appellant, MICHAEL DEFFET; DANIEL D. CAREY, Plaintiffs, v. MARCIA J. MENGAL, Clerk of Supreme Court of Ohio and Secretary of the Ohio Board of Examiners, et al., Defendants-Appellees.	)	ORDER

BEFORE: BOGGS and SILER, Circuit Judges, and JOINER, Senior District Judge[1] .

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[1] The Honorable Charles W. Joiner, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

R. William Graham, a pro se Ohio resident, appeals a district court judgment dismissing his civil rights complaint filed under 42 U.S.C. §§ 1983 and 1985. The case has been referred to a panel of the pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking injunctive, declaratory, and monetary relief, Graham and tow other individuals sued the clerk of the Ohio Supreme Court, the Justices of the Ohio Supreme Court and the members of the Ohio Board of Bar Examiners in their individual and official capacities for allegedly violating plaintiffs' due process and equal protection rights under the Fourteenth Amendment. Plaintiffs, who unsuccessfully sat for the July 1990 Ohio bar examination, claimed that the manner in which the examination was graded was arbitrary and capricious, resulting in the denial of their constitutional rights.

The district court granted defendants' motion for summary judgment as to plaintiffs' claims of procedural due process and equal protection; however, it tried the issue as to whether plaintiffs were denied substantive due process. After trial, the district court concluded that it lacked subject matter jurisdiction over the dispute and dismissed the case.

In his timely appeal, Graham essentially argues that the district court erred by concluding that it lacked subject matter jurisdiction. Graham is the only plaintiff to file a timely appeal.

Upon de novo review, we conclude that the district court was without jurisdiction to entertain Graham's complaint. See D.C. Court of Appeals V. Feldman, 460 U.S. 462, 485-86 (1983).

Accordingly, the judgment of the district court is hereby affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

F. WILLIAM GRAHAM, et al.,	:
Plaintiffs,	:
v.	:Case No. C3-90-413
MARCIA J. MENGEL, et al.,	:Judge Rice
Defendants.	:

FINDINGS OF FACT AND CONCLUSIONS OF LAW; DECISION AND ENTRY OVERRULING DEFENDANTS' MOTION TO DISMISS FOR MOOTNESS THE CLAIMS OF DEFFET AND CAREY (DOC. #34); DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTION TO DISMISS (DOC.#38); JUDGMENT TO BE ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS, DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT (DOC. #24) FOR WANT OF SUBJECT MATTER JURISDICTION; TERMINATION ENTRY

The Plaintiffs, three examinees who successfully sat for the July, 1990 Ohio bar examination was graded arbitrary and capricious and denied them substantive due

process, i.e. deprivation of a liberty/property interest, as guaranteed by the Fourteenth Amendment to the United States Constitution.[1] In particular, Plaintiffs claims centered on the scores assigned to examinees by one member of the Ohio Board of Bar Examiners, Leslie Jacobs. Plaintiffs sought declaratory and injunctive relief. On February 19 and 21, 1991, this case was tried to the Court, without the intervention of a jury. Pursuant to Rule 52 and based upon the evidence adduced at the hearing of this matter and the arguments contained in parties post-trial submissions, the Court now states its Finding of Fact and its Conclusions of Law.

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[1] Plaintiffs also alleged that they were denied procedural due process and their right to equal protection of the laws. However, prior to the trial of this case, the Court sustained judgment (Doc. #13). See Docs. ##29 and 30. The Court sustained Defendants' motion with respect to Plaintiffs' claims of deprivation of procedural due process and denial of their right to equal protection of the laws. Consequently, this case went to trial only on Plaintiffs' claims that they were denied substantive due process. i.e. deprivation of a liberty/property interest.

I. FINDINGS OF FACT.

1. The Plaintiffs, R. William Graham ("Graham"), Michael E. Deffet ("Deffet") and Daniel D. Carey ("Carey"), failed the July, 1990, Ohio bar examination. As a result of failing the July, 1990, bar examination, Plaintiffs were denied admission to practice

law in the state of Ohio.[3]

2. The Defendants are the Clerk of the Ohio Supreme Court, the Chief Justice and Justices of the Ohio Supreme Court and the members of the Ohio Board of Bar Examiners ("Board"). The Supreme Court created the Board and

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[3] Deffet and Carey passed the passed the February, 1991, Ohio bar examination and were admitted to the practice of law in Ohio on May 20, 1991. Consequently, Defendants have filed a motion to dismiss the claims of Deffet and Carey, arguing that their admission to the bar renders their claims moot. See Doc. #34. Without question, their admission to the bar moots certain of remedies sought by Deffet and Carey. For instance, their request that the Court order them admitted to the bar is mooted. Nevertheless, the Court overrules Defendants' motion to dismiss (Doc. #34) in which they argue that all claims of Deffet and Carey are moot. The remedies sought by the two are more extensive than merely seeking to have the Court order their admission to the bar. For instance, Deffet and Carey argue in their memorandum in opposition (Doc. #37) to the motion to dismiss, that if this Court finds in their favor, it can order the records regarding their results on the July, 1990, bar examination sealed. Although they did not specifically request that relief in their second amended complaint, it could be an appropriate form of equitable relief under their prayer for "such other equitable relief to which they may be entitled." Therefore, this case remains a live controversy as to Deffet and Carey. It certainly remains a live controversy as to the Plaintiff Graham who has not retaken the Ohio bar examination.

delegated to it the task of assessing, by conducting the Ohio bar examination, the minimum competency of applicants to practice law in Ohio.[4] During July, 1990, there were 12 members of the Board. The clerk of the Supreme Court serves as the Secretary of the board.

3. The Ohio bar examination is conducted over a three day period. The first and third days of the examination consist of 24 essay questions prepared by the members of the Board. Each of the 12 members of the Board prepares and grades two essay questions which are given during a one hour period. Each set of two essays is answered in one essay booklet. The second day of the examination is devoted to the Multistate Bar Examination

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[4]The Ohio Constitution provides that the Ohio Supreme Court shall have original jurisdiction over admission to to the practice of law. Art. IV, S 2(B) (1) (g).

("MBE").[5] In order to pass the Ohio bar examination, an applicant must receive a score of 75% which, in July, 1990, was 270 out of a possible 360 points.[6]

4. In July, 1990, there were two methods by which an applicant could achieve this passing score. Under the first method, an Applicant could secure a passing score through the presumptive pass rule. Under this rule, an applicant achieves a passing score if he or she is the upper 60 percentile on the MBE and he or she receives 14 points on each of two randomly selected essay booklets.[7] The second mode of achieving a passing score is for applicants who do not achieve a passing score

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[5]The MBE is an objective six hour test consisting of 200 multiple choice questions. The MBE is prepared by the National Conference of Bar Examiners in conjunction with the American College Testing Program.

[6] Each of the 24 essay questions is worth a maximum of 10 points and the MBE is worth a maximum of 120 points.

[7]For purposes of this random selection, members of the Board are paired. Thus, each set of two bar examiners grades the same one-sixth of the examinees.

under the presumptive pass rule, i.e., those who scored in the lower 40 percentile of the MBE, did not score at least 14 on their two randomly selected essay books. To achieve a passing score, under the second mode, the total of the scores of all of an applicant's essay questions, together with his or her weighted MBE score, must equal or exceed 270 points.

5. Twelve hundred and nine examinees took the July, 1990, Ohio bar examination. Of those who took the bar examination, 419 or 35.1% were unsuccessful. As a result, the July, 1990, Ohio bar examination had one of the lowest pass rates in recent history.

6. The plaintiffs all scored in the upper 60 percentile of the MBE but failed to achieve passing scores on bar examination, because none received at least 14 points on his two randomly selected essay books and because the total of each plaintiff's scores on all his essay questions and his weighted MBE scores did not equal or exceed 270 points.

For each Plaintiff, one of two randomly selected essay books contained his answers to the questions of one particular member of the Board, Leslie Jacobs ("Jacobs").

7. Jacobs was easily the most stringent grader among the members of the Board. For instance, the other eleven members of the Board assigned an average score of slightly more than 15 points (15.134), out of a possible 20 points, to each essay booklet. Jacobs assigned and average score of just in excess of 10 points (10.043) per exam booklet. Additionally, approximately 720 applicants scored in the top 60 percentile of the MBE. Five hundred and twenty-eight of those passed under the presumptive pass rule. Jacobs and the examiner with whom he was paired graded the essay booklets, containing answers to the questions they gave, of 120 of those who scored in the top 60 percentile. Of those 120 examinees, only 13 passed under the presumptive pass rule, i.e., received a grade of 13 or more on each of the two sets of essay questions.

Finally, of the 694 examinees whose essay questions Jacobs graded, only 10 received 15 or more points.

8. Jacobs testified during the trial of this case and explained the manner in which he graded questions. Jacobs started with a model answer which he had drafted. Based upon the model answer, he then scored each question between zero and ten, with zero being given for a nonexistent answer and ten being given to the ideal. Jacobs testified that a manner of factors went the grade he assigned for each question.[8] First, he considered whether the examinee recognized the field of law which was being examined. Second, he considered whether the examinee has recognized the Hornbook legal principles which applied to fact pattern set forth in the question. Jacobs' third criterion was whether the examinee was able to analyze the facts in light of the legal principles, in other words to determine to

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[8] Jacobs testified that each factor was equal importance.

what extent those principles applied or did not apply to the particular facts.[9] Fourth, he considered the manner in which an answer was written, including grammar and spelling. Fifth, he considered whether the answer contained any affirmatively incorrect statements.[10] Finally, he considered whether anything was said which reflected an error regarding the Code of Professional Responsibility and the Code of Judicial Conduct. Jacobs testified that to the best of his ability he applied these criteria consistently to all questions.

9. When asked to explain why he thought that the grades which he assigned were so much lower than those assigned by his fellow bar

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[9] In assessing the ability of an examinee to analyze the facts and to apply legal principles, Jacobs testified that he was particularly interested in whether the answer followed a logical sequence. In other words, Jacobs considered whether the conclusion in a particular answer was consistent with the discussion.

[10] Jacobs deducted points for incorrect statements.

examiners, Jacobs explained that he deducted for incorrect statements, that one of his questions had a clear need to apply a principle of the Code of Judicial Conduct and that he viewed it very severely when an answer misapplied it, and that he considered not just the content of answers but also the way in which answers were written.

10. Based upon his testimony, the court finds that Jacobs exercised professional judgment in the manner in which he graded the July, 1990, bar examination.

11. Even though he exercised professional judgment in grading the July, 1990, bar examination, Jacobs did not grade the exam in conformity with any standards set by the Ohio Supreme Court.

Indeed, Jacobs testified that there was no attempt to by the Ohio Supreme Court to have the 12 examiners apply standard criteria when grading the exam. Jacobs testified that the exam was graded by 12 individuals, each exercising his or her own best, independent

professional judgment. Additionally, he testified that he did not understand that a score of 7.5 on an answer corresponded with minimum competency.

12. The decision to deny Plaintiffs admission to the bar, based upon the scores which they received on the bar examination, was made in a judicial proceeding within the meaning of D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

II OPINION.

After the trial of this case, Defendants filed a motion to dismiss (DOC. #38) which raises the question of this Court's subject matter jurisdiction to entertain the present case.[11]

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[11] This motion to dismiss (DOC. #38) is denominated Defendants' Supplemental Memorandum. However, it raises questions relating to this court subject matter jurisdiction over this case; therfore, the Court treats the supplemental memorandum as one to dismiss for want of subject matter jurisdiction.

It is axiomatic that subject matter jurisdiction goes to the very power of a court to hear a case. Subject matter jurisdiction cannot be waived and can be raised at any time, even on appeal. 5A Wright & Miller, Federal Practice and Procedure, § 1350. Indeed, a court, whether trial or appellate, has the obligation to satisfy itself of its subject matter jurisdiction; therefore, a court may raise the question sua sponte. Id. See also, In re Wolverine Radio Co., 930 F.2d 1132, 1137 (6th Cir. 1991) ("[F]ederal courts are courts are courts of limited jurisdiction and have a continuing obligation to examine their subject matter jurisdiction throughout the pendency of every matter before them."). Accordingly, before addressing the merits of Plaintiffs' claims, the Court turns to the issues raised by Defendants' motion to dismiss for want of subject matter jurisdiction (DOC. #38).

In their motion to dismiss, Defendants argue that the decisions of the Ohio Supreme

Court to deny Plaintiffs admission to the practice of law, because of their failure to pass the July, 1990, bar examination, were judicial determinations. As such, Defendants contend that under D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983), judicial review by a federal court of those judicial decisions by the Ohio Supreme Court, pursuant to 28 U.S.C. § 1257.[12] Consequently, the argument continues, this Court is without subject matter jurisdiction to hear this case. Thus, this Court now turns to an analysis of the Feldman doctrine.

In Feldman, the Supreme Court addressed the identical question raised by Defendants' motion to dismiss (DOC. #38), namely, to what extent does a district court have subject matter jurisdiction to hear a challenge to a decision by a state court denying a person the

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[12] Section 1257 provides, in pertinent part: (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court...

right to practice law. Feldman involved two suits brought in the United States District Court for the District of Columbia by two applicants to the District of Columbia bar, Feldman and Hickey, who had not been allowed to sit for the District of Columbia bar examination because they had not graduated from law schools approved by the American Bar Association ("ABA").[13] Feldman and Hickey claimed that the District of Columbia Court of Appeals had acted arbitrarily, capriciously, unreasonably and discriminatorily in refusing to waive the requirement that one graduate from an ABA approved law school. Additionally, they asserted that the rule was unconstitutional because it created an irrebuttable presumption that the rule was unconstitutional because it created an

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[13]The District of Columbia Court of Appeals had a rule which required applicants for the District of Columbia bar examination to be graduates of a law school approved by the ABA. Feldman did not attend law school; Hickey had graduated from a law school which was not approved by the ABA.

irrebuttable presumption that only graduates of law schools accredited by the ABA are fit to practice law, because it discriminated against those who have obtained equivalent legal training and because it impermissibly delegated to the ABA the authority of the District of Columbia Court of Appeals to regulate the bar.

The question which the Supreme Court faced in Feldman was whether the decisions by the District of Columbia Court of Appeals not to grant waivers to Feldman and Hickey were judicial decisions made in judicial proceedings, such as to deny a federal tribunal, inferior to the United States Supreme Court subject matter jurisdiction to hear their claims.[14] The Supreme Court concluded that the decisions were so made, stating:

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[14]The District Columbia Court of Appeals denied the waivers in per curiam orders which were entered in response to petitions addressed to it by counsel for Feldman and Hickey.

> Admittedly, the proceedings in both Feldman's case and Hickey's case did not assume the form commonly associated with judicial proceedings. As we said in In re Summers, [325 U.S. 561, 567 (1945)], however, "[t]he form of the proceeding is not significant. It is the nature and effect that is controlling." Id. at 567.

460 U.S. at 482. In determining whether a proceeding is judicial as opposes to legislative, administrative or ministerial, the Supreme Court said in Feldman that a judicial inquiry investigates facts as they exist and enforces liabilities based upon the law as it then stands. Id. at 477. This was the situation that existed within Feldman and in the case at bar. A legislative proceeding, on the other hand, unlike the situation in both Feldman and the instant case, looks to the future by making new rules (new law) to be applied. Id

Having concluded that the proceedings were judicial in nature, the Feldman Court noted that there are two types of claims which a frustrated bar applicant could assert. The Supreme Court said:

> "the United States District Court, in denying [the plaintiff] relief, declared that there is a subtle but fundamental distinction between the two types of claims which a frustrated bar applicant might bring to federal court: The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission. The Court held that while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorney involving either the rule making authority or ;the administration of rules, . . . such is not true where review of a state court's adjudication of a particular applicant is sought. The Court ruled that the latter claim may be heard, if at all, exclusively by the Supreme Court of the United States."

460 U.S. at 485 (quoting Doe v. Pringle, 550 F.2d 596,579 [10th Cir. 1976]).[15] The Feldman Court concluded:

> Challenges to the constitutionality of ;state bar rules, therefore, do not necessarily require a United States district court to review a final state-

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[15] Doe was a challenge to a decision by the Colorado Supreme Court which denied the plaintiff therein admission to the bar because he was a convicted felon.

> court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in an on judicial proceeding. If this is the case, the district court is not reviewing a state-court judicial decision. In this regard, 28 U.S.C. § 1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States district court review of final state-court judgments are not implicated. United States district courts, therefore, have subject matter jurisdiction over general challenges to state bar rules, promulgated in nonjudicial proceedings, which do not require review of a final state court judgment in a particular case. They do not have jurisdiction, however, over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action as unconstitutional. Review of those decisions may be had only in this court. 28 U.S. C. Sec. 1257.

460 U.S. at 486. With respect to the latter class of claims, those over which a federal court does not have jurisdiction, the Supreme Court explained that a United States district court may not hear a constitutional challenge to a state court's decision in a bar admission matter when the constitutional challenge is "inextricably intertwined" with state court's decision to deny a particular bar applicant

admission to the bar because such a challenge effectively asks the district court to review the state court's decision. Id. at 482 n. 16. In short, one cannot reach and decide the constitutional issue without, at the same time, dealing with the decision to deny admission to a particular applicant to the state Bar.

In applying the foregoing pronouncement, the Feldman Court concluded that the district court did not have jurisdiction over the plaintiffs' claims that the District of Columbia Court of Appeals acted arbitrarily, capriciously, unreasonably and discriminatorily in not granting them waivers to its rule in their individual application. Id. The Supreme Court determined that the claims that the District of Columbia Court of Appeals acted arbitrarily, capriciously, unreasonably and discriminatorily inextricably intertwined with the decisions by the District of Columbia Court of Appeals denying the plaintiffs' requested waivers.

Id. at 486-87. However, the Supreme Court concluded that the district court did have jurisdiction over the plaintiffs' claims that the rule was unconstitutional on their theories that it created an irrebuttable presumption that only graduates of accredited law schools are fit to practice law, that it discriminated against those who have obtained equivalent legal training and that it impermissibly delegated to the ABA the authority of the District of Columbia Court of Appeals to regulate the bar. Id. at 487.

District courts in the Sixth Circuit have applauded Feldman to challenges to the subject matter jurisdiction of a court hearing litigation contesting the denial of a particular applicant's admission to the bar. For instance, Stanfield v. Horn, 704 F.Supp. 1487 (M.D.Tenn. 1989), affirmed, 884 F.2d 580 (6th Cir. 1989) (table), as does the present case, involved a suit in federal court any a disappointed applicant to bar. The Stanfield plaintiff claimed that by being refused

admission to the practice of law based upon the grades she received on the Tennessee bar examination, she was denied due process and equal protection of the laws. In particular, the plaintiff challenged the Tennessee rule which provided that a disappointed applicant's sole remedy was to retake the bar examination. The upshot of the Tennessee rule was that the grades given by the Tennessee Board of Law Examiners on the bar examination were final with no right to have the scores reviewed by the Tennessee Supreme Court. The rules also provided that the Board would not discuss with the disappointed applicant his or her responses to the questions on the bar examination. The district court concluded that it did not have subject matter jurisdiction over the plaintiff's claims, because the plaintiff's primary contention was that her examination had been improperly graded and that, as a consequence, she had been wrongly denied admission to the Tennessee bar.

In Ronald Smith, et al. v. Frank Celebrezze, et al., Case No. 90-CV-1874 (N.D.Ohio October 18, 1992)(unreported),[16] Judge Bell dismissed, for want of subject matter jurisdiction, a lawsuit brought by individuals who had failed the Ohio bar examination on at least two occasions. The Smith plaintiffs alleged that they were denied their constitutional rights because there is no appeal process from the grades that applicants receive on their bar examinations and because bar exam repeaters are treated differently than first time takers of the exam. Judge Bell reasoned that the plaintiffs' claims were inextricably intertwined with the Ohio Supreme Court's judicial determination denying them admission to the bar.

Initially, this Court must decide whether Feldman applies to the present case. In particular, this Court must decide whether the

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[16]A copy of Smith is attached to Defendants' motion dismiss (Doc. #38).

decisions to deny Plaintiffs admission to the bar based upon their grades on the bar examination were judicial decisions made in judicial proceedings. In Ohio, the scores awarded to a bar examinee by the Board are final, and there is no appeal to the Ohio Supreme Court. Gov. Bar R. I, § 5(D). Thus, the Board and not the Ohio Supreme Court awarded the scores of which the Plaintiffs complain.[17] Nonetheless, the Court concludes that the Board acted in judicial proceedings, within the meaning of Feldman, when it awarded the scores to Plaintiffs. To reach this conclusion, the Court engages in a two-step analysis. Initially, the Court must examine the question of whether the actions of bar admission committees appointed by state supreme courts, such as the Board herein, are considered judicial proceedings. Second, if the answer to the first question is "yes," the

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[17]Of course, the Ohio Supreme Court had initially established the score which each applicant must attain in order to pass the bar examination.

Court must consider whether the Plaintiffs' inability to appeal the grade awarded by the Board causes the Court to conclude that the Board did not act judicially when it assigned scores to the Plaintiffs.

All courts which have considered the first question have concluded that an entity, such as the Board herein, incontestably an arm of a state supreme court, acts judicially when it acts on behalf of the state supreme court in addressing bar admission questions. For instance, in Nordgren v. Hafter, 789 F.2d 334 (5th Cir.), cert. denied 479 U.S. 850 (1986), the Fifth Circuit held that the Mississippi Board of Bar Admissions was an arm of the Mississippi Supreme Court, and that, therefore, it was acting judicially, within the meaning of Feldman, when it declined to waive the rule that applicants for the Mississippi bar graduate from ABA accredited law schools. See also Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), cert. denied, 473 U.S. 907 (1985) (Texas bar admissions

committee acted in a judicial proceeding when it denied admission to an applicant on the basis of emotional and mental fitness.); Stanfield, supra.

As is noted above, the Plaintiffs did not have the right to appeal the grades which they received on their bar examinations to the Ohio Supreme Court. Therefore, the Court must next decide if the absence of such a right to appeal indicates that the decision of the Board was not made in a judicial proceeding. In Stanfield, the district court concluded that the absence of a right to appeal to the Tennessee Supreme Court did not mean that the Tennessee Board of Law Examiners did not act judicially when it administered the bar examination and assigned a score to a particular examinee's answers to the questions on the bar examination. The Stanfield court reasoned that the Tennessee Board of Law Examiners was acting on behalf the Tennessee Supreme Court when it administered the bar exam and assigned scores. Similarly, the Ohio

Board of Bar Examiners acts on behalf of the Ohio Supreme Court when it administers the bar examination and assigns scores, pursuant to the delegation of authority from the Ohio Supreme Court.[18] Moreover, the assignment of grades to the Plaintiffs was a judicial as opposed to a legislative act in that such grades were based upon the Plaintiffs; answers to the questions on the examination, a look backward to existing facts, rather than the creation of new rules that would govern this or future bar examinations. Accordingly, as with the district court in Stanfield, a case which is indistinguishable from the present litigation, this Court finds that the Board, when it assigned scores to the Plaintiffs, acted in a judicial proceeding within the meaning of Feldman.

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[18]The Ohio Supreme Court has original jurisdiction over the admission to the practice of law. Ohio Constitution, Art. IV, § 2(B)(1)(g). See also, In re February, 1986 Ohio Bar Examination Applicant No. 83, 60 Ohio St.3d 602, 573 N.E.2d 37 (1991); In re July, 1986 ohio bar Examination Applicant No. 719, 61 Ohio St. 3d 307, 574 N.E. 1047 (1991).

Nevertheless, Plaintiffs argue that Feldman does not apply, since they did not have a reasonable opportunity to raise their constitutional claims because they could not appeal their grades to the Ohio Supreme Court. Federal courts have held that Feldman applies only hen "the plaintiff [in the federal action] had a reasonable opportunity to raise his federal claim in the state proceedings." Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir. 1983), cert. denied, 467 U.S. 1210 (1984). See also, Texaco, Inc. v. Penzoil Co., 784 F.2d 1133, 1144-45 (2d Cir. 1986), reversed on other grounds, 481 U.S. 1 (1987); Robinson v. Avrivoshi, 753 F.2d 1468 (9th Cir. 1985), vacated on other grounds, 477 U.S. 902 (1986). Here, the Plaintiffs argue that the evidence demonstrates that they did not have such an opportunity. For instance, as is stated above, the rules of the Ohio Supreme Court provide that "[t]he scores as determined by the Board shall be final." Ohio Gov. Bar R. I § 5(D). Additionally, Graham has

submitted an affidavit in which he states that, after he received his results on the bar examination, he contacted Defendant Marcia J. Mengel, secretary of the Board, and was told that the Ohio Supreme Court would not review his examination. Mengel told Graham that an attempt to submit an application to have the Ohio Supreme Court review his examination would be a futile act.

In addressing this contention of the Plaintiffs, the Court's analysis is effected by three considerations. First, This Court must focus on the question of whether the Plaintiffs had an opportunity to raise their federal claims and not whether those claims were actually addressed. See Feldman, 460 U.S. at 482 n.16 (rejecting Dasher v. Supreme Court, 658 F. 2d 1045 [5th Cir. 1981]); Wood, 714 F.2d at 1546-47. The Dasher Court said if a litigant does not raise a federal claim in a state proceeding, federal courts may address that claim. The Feldman Court rejected that holding in the context of challenges to bar

examination results, upon the theory that the constitutional claims [illegible] intertwined with the state court's denial of a particular petitioner's application for admission to the bar, as to put the United States district court in a position of reviewing the state court's judicial decision made in a judicial proceeding.[19] Second, one must bear in mind the nature of the proceedings before the District of Columbia Court of Appeals in Feldman. The District of Columbia Court of Appeals merely entered per curiam orders denying the requested waivers of Feldman and Hickey. The Feldman Court recognized that those proceedings "did not assume the form commonly associated with judicial proceeding." Nevertheless, the

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[19]The Feldman Court said: If the costitutional claims presented to the United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision 460 U.S. at 482 n.16.

Feldman Court concluded that denial of waivers were judicial proceedings. Therefore, the Plaintiffs at bar need not have the opportunity to formally litigate their federal claims. Third, the question presently before the Court is its subject matter jurisdiction, the burden of proof of which rests upon the Plaintiffs. With these considerations in mind, the Court turns to the precise question of whether the Plaintiffs have demonstrated that they did not have the opportunity to raise their federal claims in the state proceedings. The Court agrees with the plaintiffs that they did not have the opportunity to have the Ohio Supreme Court regrade their examinations. However, this fact does not answer the germane inquiry, to wit: did the Plaintiffs have the opportunity to raise their federal claims with the Ohio Supreme Court or with the Board. There is simply no indication before the Court that Plaintiffs could not have presented their substantive due process claim to the Ohio

Supreme Court. The evidence demonstrates that the Ohio Supreme Court would not regrade the Plaintiffs' examination papers; however, there is simply no indication that the Ohio Supreme Court would not have considered a constitutional challenge to the bar examination. Cf. In re February, 1986 Ohio Bar Examination Applicant No. 83, 60 Ohio St.3d 602, 573 N.E.2d 37 (1991) (Under its constitutional authority to govern admission to the bar, Ohio Supreme Court sua sponte raises the question of whether an applicant actually passed the bar examination more than five years earlier.); In re July, 1986 Ohio Bar Examination Applicant No. 719, 61 Ohio St.3d 307, 574 N.E.2d 1047 (1991). Accordingly, this Court concludes that they did have an opportunity to raise their federal claims in the state proceedings.

Having concluded that the Board assigned the Plaintiffs their scores on the July, 1990, bar examination in a judicial proceeding and that, consequently, Feldman does apply, the

Court turns to the question of whether the Plaintiffs' claims are of the type which the Feldman Court held that a district court has subject matter jurisdiction to hear. Here, the Plaintiffs contend that the manner in which their bar examinations were graded was arbitrary and capricious, in violation of their right to substantive due process. Although they point to no particular rule of the Ohio Supreme Court which they assert deprives them of any constitutional rights, Plaintiffs contend that they are mounting a constitutional challenge to a broad rule of that court. Plaintiffs contend that the Supreme Court has a rule which allows examination papers to be graded in the absence of standards governing their grading. The heart of the Plaintiffs' claims is that Jacobs' grading was unfair; indeed, so unfair that it was a deprivation of substantive due process. It is simply not possible for the Court to rule on Plaintiffs' claims or to grant them the primary relief sought, an order

admitting them to the Ohio Bar, without considering the grades which they were given. Therefore, assuming for the sake of argument that the absence of such standards is a rule of the Ohio Supreme Court, that challenge is inextricably intertwined with the decision of the Board on what grades the Plaintiffs should receive on their respective examinations and whether they should have been admitted to the Ohio Bar. Accordingly, regardless of whether the Plaintiffs allege that they were denied their constitutional right to substantive due process, Feldman mandates that this court refrain from hearing this case.

Based upon the foregoing, the Court concludes that it does not have subject matter jurisdiction over Plaintiffs' claims, and therefore, it sustains Defendants' motion to dismiss for want of subject matter jurisdiction. (Doc. #38).

Finally, because it has concluded that it does not have subject matter jurisdiction over this case, the Court does not make a ruling on

the merits of Plaintiffs' claims. [illegible]
the Court does make a number of observations about these claims. The parties herein agree that the proper analytical framework for Plaintiffs' substantive due process claim is that which was set forth in Regents of the University of Michigan v. Ewing, 474 U.S. 213 (1985). See Docs. #31, at 1; #32, at 9. Ewing was a law suit brought by a student who was dismissed from the University of Michigan ("University") after failing an examination.[20] Ewing argued that the University misjudged his fitness to remain a student. The Supreme Court held that substantive due process could not be violated unless there was "such a substantial departure from accepted academic norms as to demonstrate that the person or

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[20]Among other relief, Ewing sought an order from the district court directing the University to grant him the opportunity to retake the examination, the failure of which led to his dismissal. Thus, there is an important difference between Ewing and the present case. Here, the Plaintiffs have the right to retake the Ohio bar examination. Indeed, Deffet and Carey have retaken and have passed the Ohio bar examination.

committee responsible did not actually exercise professional judgment." Id. at 225. Only when there is such a substantial departure is a court permitted to conclude that the decision was not related to the student's fitness to remain a student (or, in this case, an applicant's fitness to practice law). Id.

Here, the Court has found that Jacobs exercised professional judgment in method by which he graded the examinations. However, Plaintiffs' claims are broader than merely an attack on the manner in which Jacobs graded his portion of the bar examination. Rather, Plaintiffs challenge (and blame the Supreme Court Defendants for) the lack of grading standards and uniformity among the examiners. See Doc.#32. Thus, were this Court to reach the merits, it would be called upon to determine whether the July, 1990, bar examination, taken as a whole, was such a substantial departure from accepted norms that it demonstrates that professional judgment was

not exercised and, consequently, that the examination was not related to the Plaintiffs' fitness to practice law.

III. CONCLUSIONS OF LAW

1. Pursuant to the Feldman doctrine, this Court does not have subject matter jurisdiction over this dispute.

Based upon all the foregoing, the Court orders that judgment be entered for the Defendants and against the Plaintiffs dismissing Plaintiffs' second amended complaint (Doc. # 24) for want of subject matter jurisdiction.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

WALTER HERBERT RICE

UNITED STATES DISTRICT JUDGE

APPENDIX C

The Fourteenth Amendment in pertinent part

Section 1.

...nor shall any State deprive any person of life, liberty or property, without due process of law....

APPENDIX D

Title 28 U.S.C.

§ 1331 Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1343 Civil Rights and Elective Franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of citizen of the united State, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any other Act of Congress providing for the protection of civil rights, including the right to vote....

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993
No._____

R. William Graham PETITIONER

v.

Marcia Mengel et al., RESPONDENTS

PROOF OF SERVICE

I, R. William Graham, do declare that on this May 3, 1993, pursuant to Supreme Court Rule 29.3, I have served the attached Petition For A Writ of Certiorari on said party's counsel, David C. Greer, Counsel for Respondents, at 400 Gem Plaza, Third & Main Streets, Dayton, 45402 by depositing an envelope containing the above documents in the United States mail properly addressed to said counsel and with first class postage prepaid.

R. William Graham
R. William Graham

Subscribed and sworn to before
me this May 3, 1993

Notary Public
County and State

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAY 28 1993
OFFICE OF THE CLERK

No. 92-1778

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

R. WILLIAM GRAHAM,

Petitioner,

v.

MARCIA J. MENGEL, CLERK OF THE SUPREME COURT OF OHIO AND SECRETARY OF THE OHIO BOARD OF BAR EXAMINERS; MEMBERS OF THE SUPREME COURT OF OHIO; AND MEMBERS OF THE STATE OF OHIO BOARD OF BAR EXAMINERS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTION PRESENTED

Whether the United States District Court had subject matter jurisdiction to review a determination which was made by the Board of Bar Examiners appointed by the Ohio Supreme Court and which denied the Petitioner's Application for Admission to the Bar of Ohio in the absence of proof that the Petitioner had no reasonable opportunity to raise his federal claim in state proceedings.

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STATEMENT OF JURISDICTION OF COURT

The Complaint filed by Petitioner in the United States District Court placed that court in a position of reviewing a state court judicial decision made in a judicial proceeding. Therefore, neither the district court, the court of appeals, nor this Court has subject matter jurisdiction over the Complaint. *D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983).

STATEMENT OF THE CASE

A. Procedural Posture

R. William Graham, the sole petitioner, failed the July, 1990 Ohio Bar Examination. He and two other unsuccessful applicants, who have subsequently retaken and passed the bar examination and who have not joined in this petition, filed this civil action in the United States District Court for the Southern District of Ohio on November 29, 1990. After a trial to the Court, the District Judge on February 19, 1992 issued his Decision and Entry dismissing the Complaint for want of subject matter jurisdiction. (R. 42: Decision and Entry at p. 23, Petitioner's Appendix B) The United States Court of Appeals for the Sixth Circuit affirmed the District Court in its Decision and Order filed on February 3, 1993, citing *D.C. Court of Appeals* v. *Feldman, supra.* (Petitioner's Appendix A)

B. Statement of Facts

The relevant facts are carefully articulated in the findings of the District Court. (R. 42: Findings of Facts and Conclusions of Law, at pp. 2-7, Petitioner's Appendix B) The fact which the Petitioner finds upsetting is that one of the twelve bar examiners was more stringent than the other eleven. (R. William Graham at TR 29-30, 37-39, 47-49)

It was unequivocally established that the examiner in question was conscientious in his grading, that he carefully and thoughtfully exercised his professional judgment in his performance of his assigned tasks, that he gave high grades to the same applicants who received high grades from other examiners, that he gave low grades to the same applicants who received low grades from other examiners (Stephen P. Klein at TR 142, 144), that he had an impressive professional background and extensive experience in evaluating basic legal skills as expressed in the written work of young lawyers

(Leslie W. Jacobs at TR 186-187), that he articulated and consistently applied an intelligent set of criteria for evaluating the essays he was assigned to grade (Leslie W. Jacobs at TR 194-196), and that he devoted 125 hours of his life and professional judgment to his assigned task (Leslie W. Jacobs at TR 196). It was also unequivocally established that every successful applicant who did not obtain a shortcut to success through the presumptive pass phase of the examination had his or her examination efforts subjected to precisely the same scrutiny from the examiner in question as were the Petitioner's efforts. (Stephen P. Klein at TR 144) In Ohio, an unsuccessful applicant has an unlimited right to retake the bar examination.

SUMMARY OF ARGUMENT

The Petitioner is simply incorrect in his argument that this case is controlled by this Court's decision in *Forrester* v. *White*, 484 U.S. 219 (1988). To the contrary, the controlling precedent with respect to subject matter jurisdiction is this Court's decision in *D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). The District Judge below carefully analyzed the *Feldman* case and applied it to the facts of this case. The Court of Appeals properly affirmed the District Court's decision. The Petitioner has presented no convincing reason why this Court should have to reconsider this issue once again. For these reasons, the Petitioner's writ of certiorari should be denied.

ARGUMENT

Petitioner argues that "This Court has implicitly held that a District Court may review unconsitutional conduct of a state's action in a judicial context so long as the act sought to be reviewed was not judicial itself . . . ." (Petition at p. 5) In support of this proposition, the Petitioner cites *Forrester v. White*, 484 U.S. 219 (1988).

In the *Forrester* case, this Court held that an Illinois state court judge's decision to discharge a probation officer was an administrative decision and not a judicial act for which he should be held absolutely immune. This Court did not address the issue of whether or not the United States District Court had jurisdiction to hear Plaintiff's case in that civil action. Rather, the issue which this Court addressed in the *Forrester* case was "whether a state-court judge has absolute immunity from a suit for damages under 42 U.S.C. § 1983 for his decision to dismiss a subordinate court employee." (484 U.S. at 220)

This issue presented in the case at bar is not one involving absolute immunity. Rather, this case involves the question of the subject matter jurisdiction of the United States District Court.

The controlling precedent with respect to subject matter jurisdiction is this Court's decision in *D. C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Under that decision, judicial review by a federal court of judicial decisions by the Ohio Supreme Court is vested solely in the United States Supreme Court. Section 1257(a) of Title 28 of the United States Code provides that "final judgments or decrees rendered by the highest court of state in which a decision could be had, may be reviewed by the Supreme Court."

Article IV, Section 2(B)(1)(g) of the Ohio Constitution gives the Ohio Supreme Court original jurisdiction over admission to the practice of law in Ohio. The Ohio Supreme Court created the Ohio Board of Bar Examiners and delegated to it

the task of assessing through a periodically administered bar examination the minimum competency of applications to practice law in Ohio.

Unlike the case at bar, the plaintiffs in the *Feldman* case did not attack the judgmental grading of the bar examination. Rather, they attacked a rule that denied applicants a right to take a bar examination unless they had been graduated from an ABA-approved law school. This court found even this rule to constitute a judicial decision made in a judicial proceeding. (460 U.S. at 479) The deliberative evaluation attacked by Petitioner in the case at bar is much closer to the intellectual inquiry which is traditionally considered the gravamen of the judicial process. In this case, the Ohio Supreme Court did not delegate a simple ministerial or administrative task like switching off the dormitory lights at midnight. It delegated what was clearly the performance of a deliberative, judicial function.

Since the challenged conduct in this case falls directly under the rule of *Feldman*, the District Court correctly dismissed the Plaintiff's Complaint for lack of subject matter jurisdiction, and the Court of Appeals correctly affirmed the District Court's dismissal of Plaintiff's Complaint. Even Petitioner acknowledges in his Petition that the District Court may not review judicial acts of state officials. (Petition at p. 5)

The District Judge in this case carefully analyzed the *Feldman* case and applied it to the uncontrovertible facts of this case. (R. 42: Decision and Entry at pp. 8-23) The Court of Appeals affirmed the Decision of the District Court, citing the *Feldman* case in its written decision. It is clear that the *Feldman* case governs this civil action and not the *Forrester* case.

CONCLUSION

This case, as the District Court's careful analysis demonstrates, is controlled by this Court's decision in *Feldman*. The finding of the District Court that it was without subject matter jurisdiction over the Petitioner's claims was correctly affirmed by the Court of Appeals.

For these reasons, the Petitioner's writ of certiorari should be denied.

Respectfully submitted,

. . . . . .
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